BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HIGINIO F. MENDOZA Claimant VS. **CERTAINTEED CORPORATION** Respondent AND **CIGNA PROPERTY AND CASUALTY COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 183,009

ORDER

On August 22, 1995, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Steven J. Howard, dated June 14, 1995, came on for oral argument in Kansas City, Kansas.

APPEARANCES

Claimant appeared not having resolved this matter with respondent. Respondent and insurance carrier appeared by and through their attorney, Gary R. Terrill of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Debera A. Erickson of Kansas City, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the award of the Administrative Law Judge is herein adopted by the Appeals Board.

Stipulations

The stipulations as specifically set forth in the award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What, if any, is the liability of the Kansas Workers Compensation Fund?
(2) Did the Administrative Law Judge err in citing an unpublished Court of Appeals opinion as controlling, contrary to Supreme Court rule 7.04?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed therein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

On January 28, 1993, while running from one job location to another, claimant suffered a severe injury to his left achilles tendon. Claimant, at that time, stood five (5) feet eight (8) inches and weighed two hundred and ninety (290) pounds and, in the opinion of Dr. Brent Koprivica, would be considered "morbidly obese." Claimant alleges his morbid obesity was the proximate cause, or at the very least, contributed to his achilles tendon injury. Claimant and respondent resolved this matter by settlement hearing dated November 19, 1993, with respondent reserving all rights against the Kansas Workers Compensation Fund.

The Administrative Law Judge, in denying liability against the Kansas Workers Compensation Fund, cited Michael L. Morse v. Swift Eckrich, Inc. and Old Republic Insurance Company and The Kansas Workers' Compensation Fund as controlling. The use of this unpublished Court of Appeals opinion is in violation of Supreme Court Rule 7.04 and the Appeals Board finds the Administrative Law Judge erred in citing same.

The Appeals Board must next decide whether morbid obesity would constitute a handicap to an employee's ability to obtain or retain employment under the Workers Compensation Act in Kansas.

Respondent, while relying on the claimant's morbid obesity as constituting a pre-existing handicap to claimant's employment, further alleges additional handicap to claimant's ability to obtain or retain employment. Claimant suffered bilateral knee problems which predated the date of injury in this instance. Claimant had injured his right knee while playing football in high school and had undergone an arthrotomy for cartilage removal and a lateral meniscectomy. He had further suffered injury to his left knee in an automobile accident in 1988 and had undergone a partial removal of the cartilage of the left knee. Whenever claimant attempted to run, he did so in an unusual fashion attempting to protect his knees from further harm. Respondent alleges a combination of claimant's morbid obesity and the pre-existing knee problems contributed to the rupture of the achilles tendon on the date of accident.

K.S.A. 44-567 states in part:

> "(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:
>
> (1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the Administrative Law Judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most

> likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund . . . ."

K.S.A. 44-566(b) states:

> (b) "Handicapped employee" means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> 1. Epilepsy;
> 2. Diabetes;
> 3. Cardiac disease;
> 4. Arthritis;
> 5. Amputated foot, leg, arm or hand;
> 6. Loss of sight of one or both eyes or a partial loss of vision of more than 75% bilaterally;
> 7. Residual disability from poliomyelitis;
> 8. Cerebral palsy;
> 9. Muscular sclerosis;
> 10. Parkinson's disease;
> 11. Cerebral vascular accident;
> 12. Tuberculosis;
> 13. Silicosis or asbestosis;
> 14. Psychoneurotic or mental disease or disorder established by medical opinion or diagnosis;
> 15. Loss of or partial loss of the use of any member of the body;
> 16. Any physical deformity or abnormality;
> 17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

Respondent argues that morbid obesity could reasonably fall within the provisions of either K.S.A. 44-566(b) subsection 16 or 17.

In Denton v. Sunflower Electric Coop, 12 Kan. App. 2d 262, 740 P.2d 98, (1987), affirmed 242 Kan. 430, 748 P.2d 420 (1988), referring to K.S.A. 44-567, the Kansas Court of Appeals stated:

> "Otherwise put, a "handicapped employee" is an employee who is at a disadvantage in obtaining employment or reemployment because of physical or mental impairment with which he or she is afflicted or to which he or she is subject. An employee is not a handicapped employee if he or she is not afflicted with or subject to an impairment. An employee afflicted with or subject to an impairment is not a handicapped employee if he or she is not at a disadvantage in obtaining employment or reemployment because of the impairment.
>
> What is the meaning of the word "impairment" as it is used in K.S.A. 44-566(b) and K.S.A. 44-567? From the wording "physical or mental impairment. . . whether congenital or due to an injury" in K.S.A. 44-566(b),

> it is clear that "impairment" and "injury" are not synonymous. What is the distinction? Seeing that K.S.A. 44-508(e) directs that "injury" means a lesion or change in the physical structure of the body causing damage or harm thereto, we conclude that the word impairment in the phrase physical or mental impairment connotes limitation of function. (Citations omitted).
>
> We pause to observe that reported Kansas Appellate opinions in Kansas Workers compensation cases display instances of impression in the use of certain words, among which are "injury", "impairment", and "handicap" or "handicapped."

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the act if the employee is "afflicted with impairment of such character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980)

K.S.A. 44-567(b) provides in part:

> "In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or that the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P2.d 871, (1984).

The Appeals Board has discussed and decided the issue of whether morbid obesity would constitute a handicap, per se, as to require liability to pass to the Workers Compensation Fund. In Danny Aycox v National Carriers, Inc. and Lumbermen's Underwriting Alliance and Kansas Workers Compensation Fund, Docket No. 175,409, the Appeals Board found that morbid obesity is not a recognized pre-existing condition which would constitute a handicap, per se, so as to require liability to pass on to the Workers Compensation Fund. In Danny Aycox the respondent alleged the claimant's morbid obesity, in and of itself, was sufficient to allow Fund liability.

In the instant case, while claimant is morbidly obese, claimant also suffers from additional symptomatology which, when coupled with claimant's morbid obesity, leads the Appeals Board herein to a different result. Claimant is morbidly obese and has been for many years. Claimant also has pre-existing bilateral knee problems which, when coupled with this morbid obesity, convinces the Appeals Board that claimant satisfies the requirement that claimant was a handicapped employee on the date of injury, as he was afflicted with more than one physical or mental impairment which would constitute a handicap in obtaining or retaining employment.

The Appeals Board finds it is significant that only one medical deposition was provided in the record. Dr. Brent Koprivica, a board certified emergency medicine specialist, examined claimant on May 25, 1994. He found claimant to be five (5) feet eight

(8) inches tall and weighing three hundred twenty (320) pounds which he described as being morbidly obese. Even at the time of the accident claimant weighed two hundred ninety (290) pounds which would also constitute morbid obesity, as claimant was well over one hundred (100) pounds beyond his normal body weight. Dr. Koprivica found that a morbidly obese person runs the risk of more rapid deterioration of the spine and all weight bearing joints. It can also impair ones ability to function physically.

Dr. Koprivica found claimant had suffered a Grade 2 injury to his achilles tendon which is a tear of the connective structure between the heel and the calf muscle. Dr. Koprivica opined that because of claimant's great weight the increased force on the tendon exceeded the tendon's capacity and it ripped. Dr. Koprivica was also made aware of claimant's bilateral knee problems which pre-dated his accident. The protective measures used by claimant while running would put unusual stress on other parts of the claimant's leg including the achilles tendon which contributed to the rupture of the achilles tendon. He also found claimant's leg muscles to be weakened because of the prior knee surgeries which, again, added to claimant's difficulties and impairment. Dr. Koprivica found that the morbid obesity, coupled with the protective behaviors developed by claimant because of his pre-existing knee impairment, would make claimant a handicapped employee. He also found that but for the morbid obesity and the protected behaviors developed by claimant because of his knee impairment, he would not have ruptured his achilles tendon.

There is no evidence in the file to contradict the opinion of Dr. Koprivica. Uncontradicted evidence, which is not unprobable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In considering whether the respondent had appropriate knowledge of claimant's pre-existing conditions, the Appeals Board turns to the deposition of Sarah Hollrah, a licensed practical nurse, who was at the time of claimant's trauma, an occupational health nurse with the respondent. Ms. Hollrah knew claimant was obese and was also aware of the pre-existing problems with his knees. In her opinion, claimant would be characterized as morbidly obese with claimant's weight problems contributing to arthritic joints and painful knees which claimant suffered. Information in the personal file shows respondent was aware of claimant's pre-existing knee surgeries. This coupled with Ms. Hollrah's ongoing concern about the strenuous nature of the claimant's work in the plant, convinces the Appeals Board that respondent had knowledge of claimant's handicap at a time claimant was hired or retained in its employment.

Based upon the multitude of evidence in the file, the Appeals Board finds that respondent has proven claimant to be a handicapped employee as a result of his morbid obesity and his bilateral ongoing knee problems and further finds that but for claimant's pre-existing physical impairment, the injury suffered to claimant's left achilles tendon on January 28, 1993, would not have occurred. As such, the Appeals Board finds that the liability in this matter should be assessed one hundred percent (100%) against the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard, dated June 14, 1995, should be, and is hereby, reversed and the respondent and its insurance carrier are hereby granted reimbursement from the Kansas Workers Compensation Fund for all monies paid by respondent and the insurance carrier for medical, temporary and permanent disability benefits, and any costs and fees associated with this matter including but not limited to all

costs paid by respondent in association with the settlement between claimant and respondent on November 19, 1993.

The Appeals Board further finds the fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund 100%, with appropriate reimbursement to the respondent and its insurance carrier for any sums expended by respondent and its insurance carrier to date; as follows:

Hostetler & Associates	
Deposition of M. Sarah Hollrah, LPN	$128.10
Deposition of P. Brent Koprivica, M.D.	$238.50
Transcript of settlement hearing	$ 42.00
Richard Kupper & Associates	$ 89.55

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary R. Terrill, Overland Park, Kansas
Debera A. Erickson, Kansas City, Kansas
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director